No. 98-83

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CHARLES WILSON, GERALDINE WILSON, and RACHEL SNOWDEN, next friend/mother of VALENCIA SNOWDEN, a minor,

Petitioners,

v.

HARRY LAYNE, JAMES A. OLIVO, JOSEPH L. PERKINS, MARK A. COLLINS, ERIC E. RUNION, and BRIAN E. ROYNESTAD,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR FEDERAL RESPONDENTS HARRY LAYNE, JAMES A. OLIVO, and JOSEPH L. PERKINS

RICHARD A. CORDRAY
Counsel of Record
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Counsel for Federal Respondents Harry Layne, James A. Olivo, and Joseph L. Perkins

63pp

QUESTIONS PRESENTED

1. Whether law enforcement officers violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record their execution of a warrant?

2. Whether, if this action violates the Fourth Amendment, the officers are nonetheless entitled to a defense of qualified immunity?

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TABLE OF CONTENTS
(continued)

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

Constitutional Provisions, Statutes, Rules, Policies

TABLE OF AUTHORITIES
(continued)

PAGE

Other Authorities

INTRODUCTION

The Court granted *certiorari* in this case and in *Hanlon v. Berger*, No. 97-1927, to address both the Fourth Amendment issue and the qualified immunity issue.

The Court's ruling on the Fourth Amendment issue will break new ground on whether officers act reasonably by permitting certain third parties to accompany and observe them as they execute a warrant. At issue here is the execution of a warrant to make an *arrest* — itself a highly public event with highly public consequences. Petitioners' generalized reliance on colonial common-law cases involving trespass claims and the long-defunct practice of issuing general warrants cannot obscure the fact that the contours of the specific right they assert here under the Fourth Amendment — however the Court may resolve the issue for the first time in this case — were not "sufficiently clear that a reasonable official would understand that what he [was] doing [in April 1992] violate[d] that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Indeed, the Court should uphold qualified immunity here on the same basis as in *Mitchell v. Forsyth*, 472 U.S. 511, 533 (1985).

At the time respondents acted, courts had uniformly upheld the lawfulness of allowing news media to accompany officers to observe and record them executing a warrant. The Court has never addressed the issue of third parties accompanying officers as they execute a warrant. Judges continue to disagree about whether this conduct violates the Fourth Amendment, and no precedent had "clearly established" such a violation when respondents acted. In these circumstances, the Court should reaffirm that public officials simply "cannot be expected to predict the future course of constitutional law." *Procunier v. Navarette*, 434 U.S. 555, 562 (1978).

COUNTERSTATEMENT OF THE CASE

A. Operation Gunsmoke.

This case arose out of Operation Gunsmoke, a federal initiative approved in early 1992 by then-Attorney General William Barr. Operation Gunsmoke was a special apprehension

program in which U.S. Marshals worked with state and local police to apprehend dangerous criminals — in particular, armed fugitives who were charged with or convicted of crimes involving violence with weapons. Nationwide, the program resulted in 3,313 arrests in 40 metropolitan areas. *See* Paul W. Valentine, *For Fugitives, End of Freedom Dawns Suddenly; Early Morning Raids by Marshals Exploit the Element of Surprise*, WASH. POST, May 1, 1992, at D1 (attached as Appendix hereto) (hereafter "Valentine").

On April 14, 1992, the Circuit Court for Montgomery County, Maryland issued three bench warrants to arrest Dominic Wilson (the son of petitioners Charles and Geraldine Wilson), who had violated probation on previous convictions of robbery, theft, and assault with intent to rob. *See* J.A. 34-39. Dominic Wilson qualified as a violent offender under the program. *See id.* at 40 (warrant worksheet caution description reads: "RESISTS/ASSAULTS POLICE/ARMED"). A team unit of Deputy U.S. Marshals and local sheriff's officers was formed to try to execute the arrest warrants. J.A. 47-48.

At the time, the U.S. Marshals Service had adopted a written policy permitting members of the news media to "ride along" with officers to observe and record their activities. *See* J.A. 4-14. As the policy explains, "[r]ide-alongs . . . are simply opportunities for reporters . . . to go along . . . on operational missions so they can see, and record, what actually happens." *Id.* at 4. Pursuant to the terms of the policy, a reporter and photographer from the Washington *Post* were allowed to ride along with the team unit to observe and record the execution of various warrants (including these), over a two-week period. *Id.* at 50-51; Pet. App. 4a. The policy has since been amended to prohibit media ride-alongs. *See* J.A. 22-33; *id.* at 26.[1]

---

[1] Petitioners suggest that allowing a two-week media ride-along seems inconsistent with the "press embargo" imposed in the Memorandum of Understanding for Operation Gunsmoke. *See* Pet. 2, 45-46. The ride-along, however, was operating under similar rules, as recommended in the policy, *see* J.A. 7-8, and no article was published until after the program concluded. *See* Valentine, *supra* (App.).

B. The Execution of the Arrest Warrant.

On the morning of April 16, 1992, the team unit executed an arrest warrant for Marc Wilson, Dominic's brother, who stated that Dominic resided at the Rockville, Maryland address given in his police reports and court records, and that Dominic was there the night before. J.A. 48-49; *id.* at 40.

The sheriff's computer had "caution indicators" suggesting that Dominic Wilson was armed, had carried concealed weapons, and had assaulted police officers. J.A. 40, 48. Aware of that information, the team unit proceeded to the Rockville address, accompanied by the two newspaper personnel. At approximately 6:45 a.m., the officers secured the rear of the residence and then approached the front door, which was closed but not latched. An officer drew his gun, crouched by the door, and knocked several times. A small child answered. When the officers realized that she was just a child, they pointed their weapons away from her, asked her to come outside, and removed her to a safe location. J.A. 49; E.R. 79-82.[2]

Two officers then entered and heard a male voice. They were concerned that they could not see the person, that it was dark inside, and that their position near the door made them vulnerable. (The area by the door, known as the "fatal funnel," is where most fatal entry incidents occur.) They conducted a quick security sweep, at which point a man came into view. Both officers were unsure of the man's identity at that point. One of the officers identified himself and told the man to freeze and to place his hands where they could be seen. The man, who was cursing and irate, was slow to comply and the officers ordered him to get down on the floor, so that they could gain control of the situation and identify him. The man continued to be verbally abusive and uncooperative and was restrained. At this point, a woman appeared and told the man to settle down and control himself. J.A. 49-50; E.R. 79-82.

---

[2] "E.R." refers to the Excerpts of Record, which were filed as the joint appendix in the Court of Appeals below. The child was later identified as Valencia Snowden, and she is also a plaintiff in this case.

The man and woman were then identified as Charles and Geraldine Wilson, Dominic's parents, and the house was identified as their residence. Other officers had entered in the meantime, along with the two newspaper personnel, who observed and took photographs. An officer continued the security sweep of the residence, but nobody else was there. When questioned, the Wilsons said they did not know where Dominic lived and had no way to contact him. Respondents were inside for less than ten minutes. Soon thereafter, Dominic Wilson turned himself in. J.A. 49-51; E.R. 79-82.

The newspaper personnel did nothing more than accompany the officers and observe and report on their actions. They were not involved in executing the arrest warrant. *See* Pet. App. 70a; *id.* at 4a-5a. After Operation Gunsmoke ended, the Washington *Post* published an article about the program that described how the Marshals had gone about rounding up thousands of hardcore fugitives in a national dragnet. The article did not mention petitioners or include their photographs, which were never published. *See* Valentine, *supra* (App.); Pet. App. 5a n.4.

C. The District Court Proceedings.

Petitioners sued respondents in their personal capacity for money damages under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). They also sued for trespass and invasion of privacy; the United States was substituted as defendant on these claims, which remain pending. *See* 28 U.S.C. § 2679(d)(1). No media entities were sued.

Petitioners' *Bivens* claims asserted violations of the Fourth Amendment for: (1) using excessive force; (2) lacking probable cause to believe that Dominic Wilson would be present at the Rockville address; and (3) allowing newspaper personnel to observe and record the officers executing the arrest warrants. J.A. 51. Respondents moved for summary judgment based on qualified immunity. The District Court granted summary judgment on Counts I and II, *id.* at 52-56, but denied it on Count III, *id.* at 66. It began by expressing uncertainty about the differences between this claim and petitioners' common-law claims for trespass and invasion of privacy. *Id.* at 56 ("there

seems to be a lot of state law causes of action mixed in here"). Analyzing the issue under the Fourth Amendment, the court rejected respondents' defense of qualified immunity. *See id.* at 56-65. In doing so, however, the court ignored the only decisions existing at the time respondents acted, which had found no constitutional violation, *see Moncrief v. Hanton*, 10 Med. L. Rptr. 1620 (N.D. Ohio 1984); *Higbee v. Times-Advocate, Inc.*, 5 Med. L. Rptr. 2372 (S.D. Cal. 1980); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980), and relied instead on *subsequent* decisions in *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995), and *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995).

D. The Decision by the Court of Appeals.

On interlocutory appeal, a split panel of the Fourth Circuit reversed and upheld respondents' defense of qualified immunity. *See* Pet. App. 51a-65a. The case was then reheard *en banc*.

The full Court of Appeals again upheld respondents' defense of qualified immunity, without deciding the Fourth Amendment issue. *Id.* at 1a-50a. The majority noted that the newspaper personnel merely "observed and photographed what transpired" and were not permitted "to engage in activities that the officers could not themselves have undertaken consistent with the warrant." *Id.* at 5a, 9a. Although petitioners asserted that the media "were not assisting reasonable law enforcement efforts," the majority did not accept this assertion. *Id.* at 10a.[3] Indeed, the majority concluded that even if the officers did not intend for the media to "assist in the actual execution of the warrant," they may reasonably have believed that "permitting

---

[3] Petitioners distort the meaning of this passage from the opinion below. They claim the court held that "this Court's constitutional rule may have been clear as a general matter, but it had yet to be elaborated with the requisite factual specificity," a legal standard for qualified immunity that is too strict. Pet. Br. 34-35 (quoting Pet. App. 10a). Instead, the court stated that even if this general rule had ever been announced (which it has not), it is not clear *as a factual matter* that the officers' conduct fit within its contours. Pet. App. 10a; *id.* at 15a-17a.

the reporters to accompany the officers served a legitimate law enforcement purpose." *Id.* at 16a. Noting that the case law at the time uniformly rejected the view that this conduct violated the Fourth Amendment, and stressing that reliance on subsequent case law was "inappropriate," the majority upheld the officers' defense of qualified immunity. *Id.* at 10a-17a & nn.6-11.

The dissenting judges concluded that the officers had violated clearly established law under the Fourth Amendment. They believed that general principles protecting the sanctity of the home and confining officers within the express terms of a warrant were sufficient to overcome the qualified immunity defense, though no more specific decisions had been rendered at the time respondents had acted. *Id.* at 18a-50a.

SUMMARY OF ARGUMENT

Respondents did not violate the Fourth Amendment by allowing two newspaper personnel to accompany them and observe and record their execution of a warrant. In this case, it is undisputed that respondents properly executed a valid arrest warrant for Dominic Wilson. The newspaper personnel merely observed and recorded their actions and did not themselves engage in any conduct that implicates the Fourth Amendment.

The Fourth Amendment permits officers who are executing an arrest warrant to allow third parties to accompany them to aid in discharging their law enforcement mission. The common practice of allowing members of the public and the news media to accompany officers to observe and record their conduct is reasonable and helps to facilitate effective law enforcement. Publicizing the government's efforts to combat crime enhances public confidence and helps to deter crime. Improving public oversight of police activities through accurate media coverage is also a legitimate function of law enforcement that can reasonably be judged to deter improper conduct by law enforcement officers. In addition, in every case the law enforcement mission is aided by an accurate recording of events.

Petitioners' citation of inapposite cases involving trespass

claims and the defunct practice of issuing general warrants does not establish any constitutional violation here. The Court's Fourth Amendment jurisprudence does not simply track the common law of trespass, and the issues in this case are distant from the concerns that led to a constitutional proscription against the issuance of general warrants. In fact, at the time of the Founding, a felony arrest was a highly public event with pervasive public involvement, and the common-law traditions surrounding it afford no support for the *per se* rule against third-party accompaniment proposed by petitioners.

In this case, in particular, it was reasonable for the officers to allow the two newspaper personnel to accompany them in order to observe and record them executing the arrest warrant. The arrest of a fugitive felon remains an event of significant public importance with highly public consequences. The media personnel were limited to a purely passive role, and respondents were present at all times to monitor their actions. Aside from the entry of the residence, which was legally justified, there was no warrant to search personal papers or effects, and the officers merely made a protective sweep of the premises in pursuing their suspect. If any improper intrusion or disclosure by officers or others were judged to have occurred, it can be redressed under the common law without creating new grounds that will be asserted to suppress evidence in future criminal prosecutions.

In addition, even if the Court were to hold in this case — as a matter of first impression — that the officers violated the Fourth Amendment by allowing newspaper personnel to accompany them as they executed the warrant, respondents are entitled to a defense of qualified immunity. At the time they acted, it was not apparent in the light of preexisting law that their conduct violated the Constitution. Indeed, such legal authority as existed at the time had uniformly upheld the validity of this common practice. Even now, the lower courts remain divided about whether these actions violate the Fourth Amendment at all. The highly abstract principles that petitioners have sought to glean from generally inapposite cases do not make it apparent even in this case how the constitutional issue should be decided. In these circumstances, to require public

officials to gauge future developments in constitutional jurisprudence on pain of personal liability for money damages cannot be reconciled with the purposes of qualified immunity.

ARGUMENT

I. RESPONDENTS DID NOT VIOLATE THE FOURTH AMENDMENT BY ALLOWING TWO NEWSPAPER PERSONNEL TO ACCOMPANY, OBSERVE, AND RECORD THEM WHILE EXECUTING THE ARREST WARRANT.

Petitioners seek a *per se* rule that law enforcement officers violate the Fourth Amendment whenever they permit third parties, such as members of the public or the news media, to accompany, observe, and record them executing a warrant, particularly by entering a house without the consent of the residents.[4] The Court should reject this proposed rule and instead perform its standard inquiry into the reasonableness of the officers' actions in properly executing a valid warrant.

A. The Arrest Warrant Was Valid and the Officers Executed It Properly in This Case.

The validity of the three arrest warrants issued for Dominic Wilson is not in question. Judge Ruben of the Montgomery County Circuit Court issued the warrants on April 14, 1992. They were addressed to "any duly authorized peace officer" for the State of Maryland to take Dominic Wilson and bring him before the court to answer charges of violating his probation on previous convictions for robbery, theft, and assault with intent to rob. J.A. 34-39. They thus met the only requirements for a proper arrest warrant under the Fourth Amendment: issuance by a neutral and detached magistrate, based on probable cause,

---

[4] In occasional asides, petitioners make it clear that the *per se* rule they advocate is to be understood in the strongest possible terms, for "in our view, the Fourth Amendment would not permit news media to be brought into a private home even if a warrant so specified." Pet. 12 n.8; *see also* Pet. Br. 25 n.13 (even the "existence of warrant authority," had it been procured, "could not have made this search 'reasonable'").

and describing with particularity the person to be seized and the reason therefor. *Cf. Dalia v. United States*, 441 U.S. 238, 255 (1979).

The warrants were executed on the morning of April 16, 1992. Respondents proceeded to the Rockville address given as Dominic Wilson's residence in police reports and court records. Less than an hour before, Dominic's brother had confirmed that Dominic resided at this address and was there the night before. The officers thus had ample grounds to execute the arrest warrant at this address and to enter the house. *See, e.g., Payton v. New York*, 445 U.S. 573, 602-03 (1980) ("an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling where the suspect lives when there is reason to believe the suspect is within"). The officers knocked and announced their presence. *See Wilson v. Arkansas*, 514 U.S. 927 (1995). The initial detention of Charles Wilson created "only an incremental intrusion on personal liberty" that was justified to execute the warrant. *Michigan v. Summers*, 452 U.S. 692, 702-03 (1981). Although petitioners have claimed that the officers used excessive force, the District Court rejected this claim. *See* J.A. 55-56. The officers made a general sweep of the premises, which the Fourth Amendment permits to those executing an arrest warrant, either in order to locate the suspect or as a protective sweep. *See Maryland v. Buie*, 494 U.S. 325, 330 (1990). Although it turned out that Dominic Wilson was not present at the time, it has been long settled that officers do not execute arrest warrants at their peril of making a reasonable mistake. *Cf. Pierson v. Ray*, 386 U.S. 547, 555 (1967) ("A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not [attempt an] arrest when he has probable cause and being mulcted in damages if he does.").

B. The Newspaper Personnel Did Not Actively Participate in Executing the Warrant and Did Not Conduct Any Search or Seizure.

The newspaper personnel did not actively participate in executing the arrest warrant and did not engage in any conduct

that implicates the Fourth Amendment. *See* Pet. App. 4a-5a, 9a.

In particular, the newspaper personnel did not perform any search or seizure in this case. *Id.* at 9a, 11a n.6 ("the officers here permitted no such general independent search by the reporters"). Indeed, the Court of Appeals relied on this distinction to distinguish its own major precedent cited by petitioners, *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995). That case involved third parties who accompanied officers and actively participated with the officers by searching for evidence that was not mentioned or specified in the warrant. *See* Pet. App. 11a n.6 (distinguishing *Buonocore* as having "addressed the question of whether a third party, who is not authorized by the warrant to conduct a search, may accompany law enforcement officers in executing a warrant and undertake an independent search for items not described in the warrant"). In such cases, the Fourth Amendment is violated because the third parties are enlisted to engage in conduct that exceeds the scope of the warrant and thus is forbidden to the officers. In this case, however, the members of the news media were neither encouraged nor permitted to engage in any such conduct.

Moreover, under the Court's settled precedents, the officers and the newspaper personnel did not engage in an independent search when they observed and photographed the officers' actions in executing the search warrant. *See, e.g., United States v. White*, 401 U.S. 745, 753 (1971) (defendant "who has no constitutional right to exclude the [officer's] unaided testimony" has no "Fourth Amendment privilege against a more accurate version of the events in question"); *Lopez v. United States*, 373 U.S. 427, 439 (1963) (same); *see also United States v. Caceres*, 440 U.S. 741, 750-52 (1979) (no reasonable expectation of privacy in this situation, which "does not raise any constitutional questions"). Matters that were in plain view could be observed and photographed by the officers or by third parties; this is not a search within the meaning of the Fourth Amendment. *See, e.g., Arizona v. Hicks*, 480 U.S. 321, 325 (1987); *Texas v. Brown*, 460 U.S. 730, 739 (1983) (plurality opinion).

In addition, the photographs taken of the scene did not

constitute a seizure in violation of the Fourth Amendment. Pet. App. 9a. The newspaper personnel did not seize any tangible items; instead, they merely witnessed and recorded what the officers themselves saw and heard as they executed the warrant. The reporting that resulted did not document anything but the events that were already open to observation by the officers. Under *Jacobsen*, again, no seizure occurs within the meaning of the Fourth Amendment because there is no "meaningful interference with a person's possessory interests in that property." 466 U.S. at 113; *see Hicks*, 480 U.S. 321, 324 (1987) (recording serial numbers observed on stereo equipment is not a seizure, for it did not meaningfully interfere with anyone's possessory interest).

Thus, no independent search or seizure occurred here apart from the officers' own actions in executing the arrest warrant.

C. The Fourth Amendment Permits Officers Who Execute a Warrant to Allow Third Parties to Accompany Them to Aid in Discharging Their Law Enforcement Mission.

Because the officers' own actions in executing the arrest warrant were proper, and they did not permit the newspaper personnel to engage in any conduct that implicates the Fourth Amendment, the only remaining issue to be determined is whether the Fourth Amendment is violated by the mere presence of third parties, such as this reporter and photographer, when officers are properly executing a valid warrant.

The correct legal framework for deciding this issue is the "general touchstone of reasonableness which governs Fourth Amendment analysis," including the manner of executing a warrant. *United States v. Ramirez*, 118 S. Ct. 992, 996 (1998); *see also Summers*, 452 U.S. at 699-700. Applying that standard, the Court has noted that "the specificity required by the Fourth Amendment does not generally extend to the means by which warrants are executed." *Dalia*, 441 U.S. at 257.

Instead, the Court has held that the Fourth Amendment imposes "only three" specific requirements upon the content of

warrants: (1) they must be issued by neutral and detached magistrates; (2) they must be based on probable cause; and (3) they must describe with particularity the search or seizure that is authorized to occur. *Id.* at 255. Beyond these three requirements, the manner of executing an arrest warrant — as with a search warrant — is left initially to the officers' discretion, subject only to judicial review of the reasonableness of their conduct after the fact:

> Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that, in addition to the three requirements discussed above, [arrest] warrants also must include a specification of the precise manner in which they are to be executed. On the contrary, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of [an arrest] authorized by warrant — subject, of course, to the general Fourth Amendment protection "against unreasonable searches and seizures."

Id. at 257.

The discretion that officers are afforded when they execute a warrant includes the authority to determine when third parties may accompany them. The warrants in this case, in line with consistent practice in other jurisdictions, were directed only to any "duly authorized peace officer." J.A. 34, 36, 38. It has long been understood, however, that officers who are authorized to serve and execute a warrant have reasonable discretion to allow third parties to accompany them in order to further their law enforcement mission. For example, officers regularly recruit individuals to go along as they execute a warrant inside a home in order to help them identify the objects of the warrant; the courts have routinely held this practice to be consistent with the Fourth Amendment, even though the presence of such persons was not authorized by the warrant. *See, e.g., State v. Klosterman*, 317 N.W.2d 796, 803 (N.D. 1982); *People v. Superior Ct.*, 598 P.2d 877, 881 (Cal. 1979). These permissible third parties may even be individuals with no personal

knowledge of the crime being investigated. *State v. Wade*, 544 So. 2d 1028, 1030-31 (Fla. App. 1989); *United States v. Clouston*, 623 F.2d 485, 486-87 (6th Cir. 1980) (per curiam).

By the same token, law enforcement officers may have other good reasons to allow third parties to accompany and observe their conduct in executing a warrant, even though the third parties are not directly assisting them in that task. It would be appropriate, for instance, for officers to bring colleagues along with them for purposes of supervision or evaluation. *Cf. Crowder v. Sinyard*, 884 F.2d 804, 819 (5th Cir. 1989) ("the presence and participation of additional officers," even unauthorized officers from other jurisdictions who were present "to provide expert guidance" does not "render unlawful an intrusion by other officers who are properly on the scene"). It would also be appropriate for officers to allow an attorney to accompany them who did not assist in executing the warrant but who was likely to be involved in prosecuting any ensuing criminal charges. *See Kelley v. State*, 315 S.E.2d 916, 919 (Ga. App. 1984) (no Fourth Amendment violation where "Assistant United States Attorney was a mere observer" and "did not participate" in the officers' conduct). And it would be appropriate for officers who properly desired to photograph the scene of an arrest to allow third parties to accompany them for that purpose, so that they could concentrate their own efforts and attention on executing the warrant. *See, e.g., Stack v. Killian*, 96 F.3d 159, 163 (6th Cir. 1996).[5]

The rationale for this limited discretion is that the marginal infringement on privacy by having one or a few persons

---

[5] In *Stack*, the officers' warrant application actually mentioned that they planned to photograph their execution of the warrant. In our view, it was unnecessary to seek such permission, since these actions do not constitute an independent search or seizure. *See supra* Part IB. But the important holding in the case was that the officers did not need specific authorization to allow a media crew to accompany them in order to carry out this task: "even though the warrant said nothing about" any such third parties, the officers were justified "in permitting the accompaniment of camera personnel." 96 F.3d at 163.

accompany officers who are already lawfully making an entry pursuant to a warrant is negligible compared to the infringement effectuated by the initial entry itself. *See, e.g., Summers*, 452 U.S. at 701-03 (even the forcible detention of an individual "represents only an incremental intrusion on personal liberty" when entry "has been authorized by a valid warrant," which already constitutes "a substantial invasion of the privacy of the persons who resided there"). And this same reasoning has led the Court to hold that making a record of discussions between private citizens and government agents does not violate the Fourth Amendment, *see White*, 401 U.S. at 753, whereas electronic eavesdropping on private conversations may do so, *see Katz v. United States*, 389 U.S. 347 (1967).

At all times, however, the officers executing the warrant are "responsible for appropriately limiting a civilian's role in the conduct of a warranted search." *Commonwealth v. Sbordone*, 678 N.E.2d 1184, 1189 (Mass. 1997). If the third parties present on the scene take an active part in executing the warrant or are permitted to engage in their own independent search or seizure of items not covered by the warrant, then the Fourth Amendment is violated, regardless of whether the officers encouraged or sanctioned their conduct. *See, e.g., Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995) (Fourth Amendment violated when private security officer accompanied police and performed independent search for items not specified in the warrant). *See generally* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 4.10(d) (1996) (law enforcement officers executing a warrant may be accompanied by third parties, but "the non-law enforcement personnel must, in effect, be governed by the same rules as law enforcement personnel in considering their conduct during the search") (quotation omitted).

D. The Common Practice of Allowing News Media to Accompany Officers and to Observe and Record Their Conduct Is Reasonable and Helps Facilitate Effective Law Enforcement.

In many cases over many years, officers have permitted third-party members of the news media to accompany them and

to observe and record their entry on private premises, for purposes such as to facilitate accurate news coverage or to deter criminals by publicizing their crimefighting efforts. *See, e.g., Rogers v. Buckel*, 615 N.E.2d 669 (Ohio Ct. App. 1992) (media accompanied officers into home); *Magenis v. Fisher Broadcasting, Inc.*, 798 P.2d 1106 (Or. Ct. App. 1990) (same); *Scott v. State*, 559 So. 2d 269 (Fla. Ct. App. 1990) (same); *Miller v. NBC*, 187 Cal. App. 3d 1463 (1986) (same); *Moncrief v. Hanton*, 10 Med. L. Rptr. 1620 (N.D. Ohio 1984) (same); *Anderson v. WROC-TV*, 441 N.Y.2d 220 (Ct. App. 1981) (same); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980) (same); *Higbee v. Times-Advocate, Inc.*, 5 Med. L. Rptr. 2372 (S.D. Cal. 1980) (same). In none of these cases was such conduct found to have violated the Fourth Amendment. *But see Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995).

On the contrary, officers have been generally understood to exercise reasonable discretion about when it would further their law enforcement mission to permit members of the news media to accompany them in executing a warrant, as long as the officers appropriately limit the media's involvement and do not permit them to engage in any independent search or seizure. Indeed, this common practice mirrors a standard policy in virtually every jurisdiction, which authorizes law enforcement to permit members of the general public to "ride along" with officers and to observe them performing their official duties. The practice of "media ride alongs" is so pervasive, in fact, that some courts long ago found that this nationwide practice already had qualified as a "common custom and usage" under the common law. *See, e.g., Florida Publishing Co. v. Fletcher*, 340 So. 2d 914, 915-19 (Fla. 1976) (allowing media to accompany officers when they enter private property "is a widespread practice of long-standing"), *cert. denied*, 431 U.S. 930 (1977); MARC A. FRANKLIN & DAVID A. ANDERSON, CASES AND MATERIALS ON MASS MEDIA LAW 397 (5th ed. 1995) (court recognized "a common and accepted custom" nationally in 1982 for "reporters and photographers to accompany public officers . . . onto private premises where newsworthy events of general

public interest such as crime, shootings, fires or storms have or are occurring"); Richard Zoglin, *Live on the Vice Beat*, TIME, Dec. 22, 1986, at 60 (referring to "the increasingly common practice of letting TV crews tag along on drug raids").

In these situations, officers can reasonably determine that once they are already making a valid entry onto the premises pursuant to a warrant, the marginal effects of allowing members of the news media to accompany them may be outweighed by the many sound justifications for allowing media to observe and record them executing the warrant. For example, a major objective served by this practice is to publicize the government's efforts to combat crime. Handled with appropriate care, this is a legitimate law enforcement objective, for publicizing the fight against crime is itself a valuable weapon in helping to deter crime. *See, e.g., Aversa v. United States*, 99 F.3d 1200, 1213 (1st Cir. 1996) (referring to need for IRS to "inform the public" so as to "deter violations of the law"). Indeed, the media policy adopted by the U.S. Marshals Service at the time recognized this fact by expressly authorizing "media ride-alongs" as a way to publicize "interesting or important" cases. J.A. 4-5.

Other reasonable objectives may also be served by this practice. The oversight function of the press has been widely remarked, and the presence of third parties could serve in some situations to minimize police abuses and protect suspects. *See, e.g.*, Pet. App. 16a; *cf. People v. Boyd*, 474 N.Y.S.2d 661, 665 (Sup. Ct. 1984) ("the presence of the corroboration witness provides a fair method for augmented assurance that the warrant will not be executed with excess"). In other situations, officers could reasonably determine that the presence of media or other third parties would help to protect the safety of the officers. *See id.* at 15a-16a. Moreover, in many situations, officers are assisted by having photographs and other corroboration to provide "a more accurate version of the events in question." *White*, 401 U.S. at 753; *see Ohio v. Robinette*, 117 S. Ct. 417, 419 (1996) (describing use of "mounted video camera" to record details of routine traffic stop). Disputes in related criminal proceedings, which may also give rise to civil suits, can be resolved by consulting records that provide "the most reliable

evidence possible" of matters in which the officers participated and which they were "fully entitled to disclose." *Lopez*, 373 U.S. at 439; *see United States v. Hubbard*, 493 F. Supp. 209, 230-31 (D.D.C. 1979) (taking photographs that "accurately record the events of the search" is "a good police practice").

It is also "a legitimate function of law enforcement to facilitate accurate reporting on law-enforcement activities." *See* Pet. App. 16a. Indeed, the media ride-along policy of the Marshals Service "indicated that keeping the public informed of the activities of the Marshals Service was a duty of that agency and that media ride alongs advanced that interest." *Id.*; *see* J.A. 4 ("The U.S. Marshals Service, like all federal agencies, ultimately serves the needs and interests of the American public . . . and we depend on the news media to [keep the public adequately informed of what the Service does]"). This Court has likewise noted that public access to otherwise private facts is sometimes justified to "shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *United States Dept. of Defense v. FLRA*, 510 U.S. 487, 497 (1994). How law enforcement officers are waging the fight against crime is a proper matter of public interest, as even the common law has recognized in fashioning its legal protections for individual privacy.[6] *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (plurality opinion) ("especially in the administration of criminal

---

[6] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 652D, comment g ("Included within the scope of legitimate public concern are matters of the kind customarily regarded as 'news,'" including "homicide and other crimes, arrests, police raids"); *id.*, comment f ("Those who commit crime or are accused of it may not only not seek publicity but may make every possible effort to avoid it, but they are nevertheless persons of public interest, concerning whom the public is entitled to be informed," as they constitute "involuntary public figures"). *See also Taylor v. KTVB, Inc.*, 525 P.2d 984, 986 (Idaho 1974) ("The authorities writing in the area of invasion of privacy have all assumed and concluded that reports of governmental action in criminal matters are the legitimate province of a free press.").

justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results"); *id.* at 604 (Blackmun, J., concurring) ("public has an intense interest and deserved right to know" about "prosecution of local crimes" and "the conduct of . . . police officers").

Indeed, a ruling that law enforcement officers can *never* allow members of the news media to accompany them in order to observe and report on their execution of a warrant would mean that all such activity, which is rife with the potential for abuse, would henceforth occur in secret. This approach would sharply clash with the Court's frequent endorsement of Justice Brandeis' observation that "publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam) (quotation omitted). The resulting closed regime of law enforcement operations would disserve the core constitutional interests at stake here. And such a strict categorical rule would be inconsistent with the pragmatic "reasonableness" standard that is the touchstone of Fourth Amendment analysis. *See e.g.*, *Ker v. California*, 374 U.S. 23, 33 (1963) ("standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application").

Of course, these reasons do not *require* police to allow third parties, civilian employees, or news reporters to be present at the scene of a police raid. In many instances, officers may judge that it is neither prudent nor desirable to do so. *See, e.g.*, J.A. 4 ("not every operational situation lends itself to a ride-along"). And certainly the press can claim no *right* to be present at the scene. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972) ("Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded."). But the issue here is different and the claim is more modest: officers in particular cases are permitted to exercise reasonable discretion about whether allowing third parties, such as members of the news media, to accompany them merely in order to observe and record them executing a warrant will further their law enforcement mission.

E. It Was Reasonable for Respondents to Allow Two Newspaper Personnel to Accompany Them to Observe and Record Them Executing the Warrant.

In each case, therefore, in applying the Fourth Amendment it is necessary to examine the reasonableness of the officers' conduct by considering "both the character of the official intrusion and its justification." *Summers*, 452 U.S. at 701.

Here, respondents were executing a valid arrest warrant for Dominic Wilson, a thrice-convicted felon, which authorized a "substantial invasion of privacy" by allowing the officers to seize him, take him into custody, and require him to answer in court on the charges specified. *Id.* The media presence was limited to two people, who accompanied the half-dozen officers executing the warrant. Care was taken to limit the newspaper personnel to a purely passive role that did not include engaging in any independent search or seizure. The officers were present at all times and able to monitor the media's actions, which were subject to controls that prevented any public disclosures until the fugitive apprehension program ended. *See* J.A. 7-8. The alleged crimes which gave rise to the arrest warrant were run-of-the-mill felony charges that did not appear to involve any intensely private or personal matters. In addition, no search warrant authorized any especially sensitive intrusions in this case, such as a strip search or a search involving physical penetration of the body.

On the other side of the scale, respondents could make a reasonable judgment that allowing the two newspaper personnel to accompany them in order to observe and record their actions would be beneficial to their law enforcement mission.[7] These

---

[7] As in any case applying the Fourth Amendment, the actual subjective motivations of individual officers are irrelevant to the analysis of whether their conduct was objectively "reasonable." *Scott v. United States*, 436 U.S. 128, 137-38 (1978). The same is true of the legal analysis in Part III, *infra*, concerning the qualified immunity defense. *Crawford-El v. Britton*, 118 S. Ct. 1584, 1592 (1998).

individuals were present to gather news information that the Marshals Service had determined would be useful to their law enforcement mission by helping to publicize their efforts to carry out a nationwide fugitive apprehension program of massive proportions. *See* Valentine, *supra* (App.) (the dragnet effort "resulted in 3,313 arrests in 40 metropolitan areas" and locally resulted in the arrest of "350 fugitives"). This determination was certainly reasonable. At the same time, the media's involvement was likely to promote the aims of law enforcement by ensuring a more accurate understanding of their activities and objectives by the public. *See* Pet. App. 16a; J.A. 4.

The media also observed and photographed the officers' actions in executing the warrant, which created a record that was likely to prove useful as "the most reliable evidence possible" of the events. *Lopez*, 373 U.S. at 439. Indeed, in this case, their eyewitness testimony could have aided in evaluating petitioners' subsequent allegation that respondents used excessive force, which if correct would have been a violation of the Fourth Amendment. *See, e.g., Robinette*, 117 S. Ct. at 421 (use of videotape would aid in resolving fact-specific inquiry into whether "a consent to search may be deemed voluntary"); *United States v. Nicholson*, 17 F.3d 1294, 1296 (10th Cir. 1994) (videotape reviewed to resolve suppression issue).

In the circumstances, therefore, the officers could make a reasonable judgment that the presence of the two newspaper personnel on the premises, observing the execution of the warrant, would be helpful in facilitating the broader goals of effective law enforcement, even though they provided no immediate physical assistance to the officers in making an arrest. *See, e.g., Kelley*, 315 S.E.2d at 919 (no Fourth Amendment violation where Assistant United States Attorney who was permitted to accompany officers "was a mere observer and did not participate" in executing the warrant). For this reason, the court below correctly emphasized that it is crucial to the Fourth Amendment analysis "to understand the distinction between an intent that the reporters assist in the actual execution of the warrant and a reasonable belief that permitting the reporters to accompany the officers served a legitimate law enforcement

purpose." Pet. App. 16a. But the categorical ruling sought by petitioners would not permit such reasonable judgments to be made, and would open up broad new vistas for finding constitutional violations based on whether third parties like news reporters or others were ever permitted to be present and to witness the execution of a warrant. This approach would be completely out of step with the "general touchstone of reasonableness which governs Fourth Amendment analysis." *Ramirez*, 118 S. Ct. at 996.

In the circumstances of this case, therefore, the manner in which respondents executed the arrest warrant was reasonable and did not violate the Fourth Amendment.

II. PETITIONERS' GENERALIZED DISCUSSION OF AUTHORITIES DOES NOT ESTABLISH A FOURTH AMENDMENT VIOLATION HERE.

Petitioners' argument on the Fourth Amendment issue relies heavily on a generalized treatment of common-law cases from colonial times as support for a *per se* rule against third parties accompanying officers into a residence to execute a warrant. *See* Pet. Br. 14-24. The argument largely ignores the common law of arrests, however, which is most germane to the facts of this case and indicates that felony arrests were regarded as highly public events with pervasive public involvement. Petitioners' authorities, moreover, are inapposite, and do not address the issue of when officers may be accompanied by third parties, such as members of the news media, as they execute a warrant. Indeed, the abstract principles presented by petitioners do not square with some of the Court's recent holdings on the reasonableness of officers' actions in executing warrants.

A. Colonial Cases Involving Trespass Claims and the Defunct Practice of Issuing General Warrants Do Not Establish Any Fourth Amendment Violation.

Petitioners discuss several cases dating back to the colonial period, which ostensibly support their argument that the officers' conduct in this case was illegal. None of those cases,

however, involved the issue of when third parties may accompany officers to assist in or observe the execution of an arrest warrant, or indeed of any warrant. At most they reinforce the uncontroversial proposition that the Fourth Amendment was explicitly intended to abolish general warrants. Beyond that, however, these older cases addressed very different matters that shed little light on the issues presented here.

The case of *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), is renowned for having ruled that general warrants are illegal and provide no authority to enter a home and perform a general search for evidence not described with particularity in the warrant. *Wilkes* was a trespass case, decided against the officers and in favor of the victims of a general search, who were alleged to be the publishers of a seditious libel. The case involved a warrant to arrest and search, but the problem that vitiated the authority of the warrant was that it did not specify with particularity the persons to be seized, the places to be searched, or the papers to be seized. *Id.* Instead, it stated only in general terms that the messengers of the Crown were authorized to search for "the authors, printers, and publishers" of a particular pamphlet and to seize them, together with their papers. Under this general warrant, the authorities proceeded to arrest 49 persons in three days and seize extensive amounts of private papers. The court ruled that this nameless warrant was void and illegal. *Id.* at 489-90.

Entick v. Carrington, 19 How. St. Tr. 1029 (K.B. 1765), was presented on similar facts, and reached a similar result. Here the offending warrant was specific as to the person, but general as to papers. Again in an action for trespass, the court held that a general warrant does not privilege officers to undertake a general search, and that such warrants, which had their origins in the abhorrent practices of the Star Chamber, were inconsistent with the traditions of the common law. *Id.* at 1069-72. *Beardmore v. Carrington*, 95 Eng. Rep. 790 (C.P. 1764), which also held that a search conducted under a general

warrant was invalid at the common law, is to the same effect.[8]

The Court warmly approved *Entick* and discussed it at length in *Boyd v. United States*, 116 U.S. 616 (1886). That case involved a prosecution for customs fraud, and the defendant disputed the authority of a statute that authorized "a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him." *Id.* at 623. The Court reaffirmed that the Fourth Amendment abolished the practice of issuing general warrants, but also held that any search for "mere evidence," which creates the "forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime" is condemned by the Fourth and Fifth Amendments. *Id.* at 630. The former point remains valid, but the Court has since repudiated the "mere evidence" rule as an "irrational" and "discredited" fiction that became unnecessary and unhelpful after adoption of the exclusionary rule. *Warden v. Hayden*, 387 U.S. 294, 302-04 (1967); *see also id.* at 314-15 (Douglas, J., dissenting) (characterizing the twofold holding in *Entick* as invalidating both general warrants and searches for mere evidence). This significant further development in the law shows the need to treat the broad generalities of the colonial cases with greater caution and precision.

Finally, the older case of *Semayne v. Gresham*, 77 Eng. Rep. 194 (K.B. 1604), is somewhat closer to the mark, though still quite distant. There the court ruled that a sheriff could not forcibly enter a house merely to serve civil process, "for by colour thereof, on any feigned suit, the house of any man at any time might be broke." *Id.* at 198. That situation is concededly distinct, however, from the service of criminal process or the

---

[8] The writs of assistance so fervently opposed by the colonists were but a more objectionable form of general warrant, since the vice of lacking particularity was compounded by the virtually unlimited duration of the writs, which remained valid throughout the life of the reigning sovereign. *See, e.g.*, NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 53-54 (1937).

execution of an arrest warrant, which confers greater authority upon the officers. *Id.* at 195. Indeed, no less an authority than Blackstone recognized that in the latter situation, "the public safety supersedes the private." 4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *223 (1769); *see also infra* Section IIC (discussing common-law authority of officers and private persons to enter houses to arrest felons, with or without a warrant).

Petitioners also cite a number of cases involving warrantless searches. *See* Pet. Br. 24-29. By definition, however, these cases are inapposite, for the issue here concerns the manner in which officers may execute *a valid warrant*. The constitutional inquiry is governed by the reasonableness standard laid down in *Dalia* and *Ramirez*, and must be evaluated against the backdrop of a valid warrant that already has sanctioned an intrusion into private premises. Rather than a freestanding invasion of privacy as occurs in the warrantless cases, therefore, the issue here concerns the marginal effects of conduct ancillary to a proper and "substantial invasion of the privacy of the persons who [reside in the home]" that has been effected under the auspices of the valid warrant. *Summers*, 452 U.S. at 703.

The Court itself has never addressed the issue of who may properly attend or participate in the execution of a warrant. Thus petitioners' wide-ranging search for relevant precedents is unavoidable. Yet the principal authorities that they cite offer little guidance on the issues presented in this case.

B. The Court's Fourth Amendment Analysis Does Not Simply Track the Common Law.

One of the false postulates of petitioners' argument is their assertion that if a third party makes a nonprivileged entry upon private property, which constitutes a trespass at common law, this same action *ipso facto* creates a violation of the Fourth Amendment. *See, e.g.*, Pet. Br. 14-19. In many cases, however, the Court has made it plain that further developments in the law have rendered this analogy obsolete.

In fact, the Court has held on numerous occasions that

constitutional law on search and seizure does not simply track the common law of trespass or arrest or any other branch of the common law. "The common law . . . made many things unlawful, very few of which were elevated to constitutional proscriptions." *California v. Hodari D.*, 499 U.S. 621, 626 n.2 (1991). One aspect of the peculiar concern at the common law, for example, was to effectuate the established rule that officers were not permitted to search for or to seize "mere evidence" of crime — an archaic and overly restrictive rule that has been repudiated in modern cases applying the Fourth Amendment. *Hayden*, 387 U.S. at 300-10. The common law also was preoccupied with the struggle to curb the controversial practice of issuing "general warrants" to search or arrest, which did not bother to specify the places to be searched, the property to be seized, or the persons to be arrested — a practice that was eliminated by the particularity requirement of the Fourth Amendment. *See, e.g.*, N. LASSON, at 120. These concerns dominate the principal English cases discussed by petitioners, *see supra* Section IIA, but they have nothing in common with the limited issues presented here, where the officers were executing a valid warrant that complied in every respect with the dictates of the Fourth Amendment, *see supra* Section IA.

Moreover, "[t]he premise that property interests control the right of the Government to search and seize has been discredited." *Hayden*, 387 U.S. at 304. By articulating doctrines such as the "open fields" exception to the Fourth Amendment, the Court made it clear long ago that in a great variety of instances no "illegal search or seizure" occurs "even if there had been a trespass." *Hester v. United States*, 265 U.S. 57, 58 (1924). Indeed, the same disjunction can operate in the other direction, as with electronic eavesdropping. In *Katz*, for example, the Court held that the reach of the Fourth Amendment "cannot turn upon the presence or absence of a physical intrusion into any given enclosure," for the analytical underpinnings of that premise, found in earlier cases, "have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling." 389 U.S. at 353. *See also United States v. Karo*,

468 U.S. 705, 712-13 (1984) ("The existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated" because "an actual trespass is neither necessary nor sufficient to establish a constitutional violation.").[9]

Indeed, the Court has often cautioned that there are "important differences between the common-law rules relating to searches and seizures and those that have evolved through the process of interpreting the Fourth Amendment in light of contemporary norms and conditions." *Payton v. New York*, 445 U.S. 573, 591 (1980); *see also Steagald v. United States*, 451 U.S. 204, 217 n.10 (1981). It simply "does not follow that the right to exclude conferred by trespass law embodies a privacy interest also protected by the Fourth Amendment." *Oliver v. United States*, 466 U.S. 170, 183 n.15 (1984). Instead, the proper analysis of whether the Fourth Amendment is violated must apply the Court's modern jurisprudence to the facts presented in each new application that may arise. This task is especially important in an area of the law that the Court has not previously addressed, as is true here where third parties merely accompany officers as they execute a warrant. *See, e.g., Bills v. Aseltine*, 52 F.3d 596, 603 (6th Cir. 1995) ("The full parameters of the role of private citizens in executing . . . warrants has not been completely, or clearly, defined.").

C. The Common Law of Arrests Does Not Support the Claim of a Fourth Amendment Violation Here.

In any event, if the Court were to look to the common law for guidance on the issues raised in this case, it is necessary to consult the relevant doctrines. Here respondents were executing

---

[9] Even if the common law of trespass were viewed as controlling here, the fact that certain courts have held that members of the news media are privileged to accompany officers into private premises based on "common custom and usage," *see supra* Section ID (discussing cases), further indicates that this basis for finding a constitutional violation is problematic at best.

an arrest warrant, not a search warrant, so the proper authorities are those concerning the common law of arrests. The suggestion that this case — in which the officers did not conduct any general search of a home to ransack private papers and effects, but made only a mere protective sweep — is tantamount to British cases disapproving general warrants is an unpersuasive exercise in hyperbole.

Indeed, at the common law it is quite clear that an arrest was a highly public event with highly public consequences. The "fiercely proud citizens who adopted the Fourth Amendment" (Pet. Br. 19) subscribed to common-law principles that greatly empowered all members of the community to participate in the arrest of felons, in order to provide much-needed protection for the public safety. Indeed, in colonial times the enforcement of the law was necessarily a participatory activity, since in almost all British and American jurisdictions the concept of a standing police force was unknown. *See* 3 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 1-7 (1956) (noting that even the word "police" was largely unknown in England in the 18th century). Such a concept was not even seriously discussed until the introduction of the London and Westminister Police Bill of 1785, and no such legislation was enacted until more than forty years later, at the insistence of Sir Robert Peel. *Id.* at 108-09; *see also id.* at 89-107 (discussing the aftermath of the Gordon riots of 1780 and the inadequacy of existing institutions for keeping the peace); *see also* 1 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 196-97 (1883) ("Nothing could exceed the inefficiency of the [few] constables and watchmen."). For many offenses, in fact, the authorities had determined that given the paucity of public officials to enforce the law, the most effective means of apprehension was a system of public rewards as incentives that would stimulate private citizens to apprehend offenders and bring them to justice. *See* 4 W. BLACKSTONE, at *291-92; 2 L. RADZINOWICZ, at 57-137.

As a result, the common law empowered private persons to arrest felons on virtually the same basis as a crown officer could do so. An arrest warrant could be directed either to a peace

officer or to a private person, and the execution of a warrant by either was equally good. *See* 2 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN *110 (1678).[10] Even where no warrant had been issued, a private person "had the power to arrest without warrant for a felony, committed in his presence, and for one, actually committed in the past, if he had reasonable ground to suppose that it had been committed by the person whom he arrested." *United States v. Coplon*, 185 F.2d 629, 634 (2d Cir. 1950) (L. Hand, J.); *see also* 1 J. STEPHEN, at 193. *See generally* 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, ch. 12, §§ 1-27 & ch.13, §§ 27 & 29, pp. 74-79, 85-86 (2d ed. 1724).[11] Early decisions in this country confirmed that the adoption of constitutional restrictions on search and seizure did not disturb the broad arrest powers afforded by law to private persons, which were thought to be "essential to the welfare of society." *Wakely v. Hart*, 6 Binn. 316, 318 (Pa. 1814); *see also Rohan v. Sawin*, 59 Mass. (5 Cush.) 281, 284-85 (1850).

In addition, when making a felony arrest, an officer could command assistance from all able-bodied males over the age of fifteen; every private person so commanded was "bound" to assist and could be lawfully punished for failing to do so. *See* 1 M. HALE, at *581. This practice evolved originally from the "hue and cry," which in medieval times was the means of raising the inhabitants to apprehend a felon, upon pain of amercement if they did not quit their homes to lend their aid. *See, e.g.*, 1 J. STEPHEN, at 184-90; 4 W. BLACKSTONE, at *290-91. Private persons involved in making an arrest were authorized "to resort to the same measures [accorded the officer himself]

[10] At the common law, the only difference was that the officer was bound to execute the warrant or to answer for his failure, whereas a private person was not bound to execute it. *See* 2 M. HALE, at *110.

[11] Here again, the difference was that a private person acted at his peril; if it turned out that no felony had been committed, he could be held liable for his acts. By contrast, an officer was privileged from suit if he acted upon suspicion of felony with reasonable grounds to do so, whether or not the suspicion proved accurate. *See* 2 M. HALE, at *82.

to secure the arrest of the accused," including the use of deadly force where arrest was resisted, and were denominated in the law as *posse comitatus*. Rollin M. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 227 (1940); *see also* 1 M. HALE, at *588; 2 *id.* at *119; 1 J. STEPHEN, at 193.

Pertaining to the manner of making an arrest, several of these points that were well established at the common law are relevant here. First, as stated above, when officers were executing an arrest warrant, they were authorized to call upon any and all private persons to accompany them and assist in their efforts. 2 W. HAWKINS, ch. 13, § 29, p. 86 ("any one may lawfully assist" an officer executing a sheriff's warrant). Indeed, contrary to the accepted practices of modern law enforcement, private persons were authorized to execute warrants in their own right, whether or not an officer was present or participating at all in the apprehension. 2 M. HALE, at *110. More broadly, private persons were authorized to arrest felons even without a warrant, and could employ all of the same means available to officers in doing so. 1 *id.* at *588.

As for the privacy interests claimed by petitioners here, it is noteworthy that at the common law, both private persons and officers were justified in breaking open doors to enter a house to apprehend a felon pursuant to an arrest warrant, after first announcing their presence. *See* 2 W. HAWKINS, ch. 14, §§ 1-9, pp. 86-87; 1 M. HALE, at *583.[12] Indeed, where the suspect was known to have committed a felony, then he could be taken inside his house by officers or private persons, with or without a warrant, and forcible entry for this purpose was justified. *See* 2 W. HAWKINS, ch. 14, § 7, p. 86; 1 M. HALE, at *588 ("If a felony be committed, and A. suspects B. and B. being in his house refuse to open the doors, or render himself, it seems A.

[12] It bears note that in the same discussion where Lord Hale spells out this broad authority to enter a private house to arrest a felon, he expresses grave doubt about the propriety of executing a general warrant "to search all places, whereof the party and officer have suspicion" — the very practice specifically addressed and proscribed by the Fourth Amendment. 2 M. HALE, at *114.

may break open the doors to take him; and so may the constable, if A. acquaint him therewith"); 2 *id.* at *76-77, 82.[13]

As considered above, *see supra* Section IIB, the common law cannot be accepted uncritically as the baseline for applying the Fourth Amendment. But if the common law is taken as providing some guidance on these matters, it weighs against petitioners here. It hardly can be contended that private persons who could arrest felons on their own initiative without a warrant and even on bare suspicion, who could use force and enter houses to effectuate the arrest of felons, who could execute warrants and had a public duty to assist officers in doing so, would be barred from simply attending and observing officers executing an arrest warrant where the officers had authorized this attendance as a reasonable means of furthering the aims of their law enforcement mission.

On the contrary, at the common law a felony arrest was always regarded as a highly public event with highly public consequences. It involves the "serious step of taking a person into custody for the purpose of prosecuting him for a crime." *Buie*, 494 U.S. at 333. And it is a matter deeply interesting to the public, for if the law is not carried out properly, "malefactors would escape to the common detriment of the people." 2 M. HALE, at *78-79.

D. Petitioners Have Found No Law Establishing a Fourth Amendment Violation in This Case, But May Press Their Claims Under the Common Law.

In the end, petitioners' treatment of the common-law authorities operates at an unacceptable level of generality that cannot control the issues raised in this case. The proposition that officers executing an arrest warrant are constitutionally

---

[13] Blackstone adds the caveat that if a private person acts to arrest a felon upon bare suspicion only, then "he cannot justify breaking open doors to do it." 4 W. BLACKSTONE, at *289-90. In the case at bar, of course, Dominic Wilson was already a thrice-convicted felon who was sought for having violated the terms of his probation.

disabled, upon entering a residence, from taking actions that are not expressly authorized by the warrant and that would violate the common law is overbroad and inconsistent with many of the Court's decisions. In *Summers*, for example, the Court upheld the detention of persons encountered during the search of a home without any explicit authority to do so, though the officers' actions would have constituted a battery or false imprisonment at the common law. 452 U.S. at 701-06. In *Buie*, the Court upheld a protective sweep of the premises without probable cause or express authority, which would not have been permitted at the common law. 494 U.S. at 334-337. And in *Hayden*, the Court held that officers could seize items of clothing that were uncovered during a search of a home but not identified in any warrant, even though the common law did not permit officers to search for or seize "mere evidence" of crime. 384 U.S. at 300-03.

The proper standard, instead, is reasonableness, which again must be applied here in circumstances where the arrest warrant already has sanctioned an intrusion into the home and "a substantial invasion of the privacy of the persons who resided there." *Summers*, 452 U.S. at 703; *see also Ramirez*, 118 S. Ct. at 996. Decisions such as *Dalia* establish that the Fourth Amendment addresses three specific concerns about the kinds of warrants that may be issued and otherwise confers upon officers reasonable discretion to decide how best to execute warrants in a manner that will further their law enforcement mission in particular instances. *See* 441 U.S. at 257. Courts must consider the reasons presented to justify the officers' actions, and assess them against the extent of any intrusion actually effected by the marginal presence of third parties when the warrant is executed.

This fact-specific assessment cannot be performed on the basis of mere dictum or platitudes. For example, if after proceeding to the Rockville address respondents had encountered Dominic Wilson in the street, there is no doubt that they could have arrested him in public, *see United States v. Watson*, 423 U.S. 411 (1976), and there would be no serious issue of a Fourth Amendment violation, even though the media

would have "accompanied" the officers "to observe and record their execution of a warrant." Pet. Br. i. If instead Dominic Wilson had answered respondents' knock on the door and been arrested at that point, the entry of the newspaper personnel onto petitioners' property (though not into the residence) would still be a nonprivileged trespass without consent — thus falling within the rule asserted by petitioners here — but again there would be no serious issue that the Fourth Amendment was violated by their mere presence.

The officers' entry into the house, accompanied by the newspaper personnel, and the specific actions that were taken there, are factors in the necessary calculus to gauge the overall reasonableness of respondents' conduct. But as then-Justice Rehnquist has stated, "the adage that 'a man's home is his castle'" is a general theme that "cannot be accepted as an uncritical statement of black letter law which answers all questions in this area." *Steagald*, 451 U.S. at 229 (Rehnquist, J., dissenting). It particularly cannot be taken to dispose of the issues here pertaining to the common law of arrests, which sanctioned extensive intrusions into the privacy of a residence — by officers and private persons alike — to protect the public safety by facilitating the apprehension of felons.

It is also important to recognize, as the Court has bluntly stated, that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'" *Katz*, 389 U.S. at 350. If law enforcement officers take the proper steps to obtain and execute a valid arrest warrant, and act within the general parameters of reasonableness in carrying out their duties, then the Fourth Amendment requires no more. If petitioners are dissatisfied with the officers' conduct, they can continue to seek redress by pursuing their common-law remedies. For "the protection of a person's general right to privacy — his right to be let alone by other people — is, like the protection of his property and of his very life, left largely to the law of the individual States." *Id.* at 350-51.

Here petitioners have asserted claims for trespass and invasion of privacy against respondents under Maryland law.

See Pet. Br. 6 n.1. When common-law claims are asserted against federal officials, they are processed against the United States government and do not subject the individual officers to personal liability for money damages. *See* 28 U.S.C. § 2679(d)(1). These claims, which remain pending before the District Court, are sufficient to protect the privacy interests of individual citizens without reaching out to fashion any supplemental basis for relief, grounded in the Constitution, that would introduce a new basis for excluding material evidence in criminal cases.

Finally, petitioners express concern about the particular risks that media intrusion pose for public disclosure of private information. Pet. Br. 19-24. The law requires the press to be sensitive to these concerns also; the article ultimately published by these newspaper personnel on Operation Gunsmoke, for example, did not even mention petitioners. *See* Valentine, *supra* (App.). But in any event, the subsequent act of publicity gives rise to a very different claim even under the common law, one that has nothing to do with the Fourth Amendment issues raised in this case. *Compare Restatement (Second) of Torts* § 652B (intrusion upon privacy is actionable "if the intrusion would be highly offensive to a reasonable person"); *with id.* § 652D (publicizing of private facts is actionable if the matter publicized "would be highly offensive to a reasonable person" and is "not of legitimate concern to the public"). Indeed, where officers properly execute a valid warrant, and later act improperly by publicizing private information or giving it to the media for publication, their conduct is actionable under the common law or perhaps the Due Process Clause, but it does not retroactively create a violation of the Fourth Amendment. *See, e.g., Baker v. Howard*, 419 F.2d 376 (9th Cir. 1969) (improper release of information by police to radio station is not actionable under federal law); *York v. Story*, 324 F.2d 450 (9th Cir. 1963) (police officer taking nude photographs of assault victim and circulating them to other officers is actionable under Due Process Clause as arbitrary conduct that shocks the conscience), *cert. denied*, 376 U.S. 939 (1964).

III. IF THE COURT HOLDS THAT RESPONDENTS VIOLATED THE FOURTH AMENDMENT, THEY ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE LAW WAS NOT CLEARLY ESTABLISHED AT THE TIME THEY ACTED.

The ruling below is faithful to the doctrine of qualified immunity that the Court has extended to state and local officials. The Fourth Amendment issue raised here has not been definitively determined by the precedents of this Court or any other court; presents a hotly disputed question on the merits; had been decided in favor of the constitutionality of respondents' conduct in several decisions rendered before they acted; and at the time of their actions had never been decided adversely to such conduct by *any* court *anywhere*. In these circumstances, the Court's precedents provide uniform support for respondents' defense of qualified immunity in this case.

A. Qualified Immunity Shields Officials from Personal Liability Where the Unlawfulness of Their Conduct Is Not Apparent in the Light of Preexisting Law.

The Court has settled that government officials performing discretionary functions are immune from suit unless their conduct violates "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). To defeat a defense of qualified immunity, the contours of the constitutional right alleged to be violated "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," which requires that "in the light of preexisting law, the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640.

The purpose of this doctrine is to alleviate concern that the threat of personal liability for money damages would "'dampen the ardor of all but the most resolute or the most irresponsible'" public officials. *Harlow*, 457 U.S. at 814 (quoting *Gregoire v.*

Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), *cert. denied*, 339 U.S. 949 (1950)). Shielding officials from lawsuits that may distract them from their governmental duties has been judged necessary and appropriate to "encourag[e] the vigorous exercise of official authority." *Butz v. Economou*, 438 U.S. 478, 506 (1978); *see also Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

To this end, the Court has developed an objective test for determining whether the law existing at the time "clearly established" that such conduct was prohibited. First, the right at issue must be defined with reasonable particularity, which means that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that, in the light of preexisting law, the unlawfulness must be apparent." *Id.* In making this determination, which is a pure question of law, a court should "use its 'full knowledge of its own [and other relevant] precedents,'" *Elder v. Holloway*, 510 U.S. 510, 516 (1994), and thus it is proper to look to "the opinions of this Court, of the Courts of Appeals, or of the local District Court" that existed at the time. *Procunier v. Navarette*, 434 U.S. 555, 565 (1978); *see also Davis v. Scherer*, 468 U.S. 183, 192 & n.9 (1984).

Above all, the Court has stressed that officials cannot "reasonably have been expected to be aware of a constitutional right that had not yet been declared." *Procunier*, 434 U.S. at 565. "Such hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected." *Mitchell*, 472 U.S. at 535. "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818. For these reasons, "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. The decision below is consistent with

these principles, which the court applied to uphold respondents' defense of qualified immunity. *See* Pet. App. 6a-17a.

In the circumstances presented here, the proper resolution of the Fourth Amendment issue was not apparent in the light of preexisting law. The Court has not squarely addressed the general issue of when third parties may accompany officers in executing a warrant; indeed, it is going to decide the specific issue involving news media for the first time in this very case. *See, e.g., Bills*, 52 F.3d at 603 ("The full parameters of the role of private citizens in executing search warrants has not been completely, or clearly, defined."). The Fourth Circuit recognized that it had no clear precedent addressing or foreclosing the issue, and that even subsequent decisions from around the country revealed a continuing circuit conflict on the issue. *See* Pet. App. 10a-14a. Against that legal landscape, which will be discussed in more detail below, respondents were entitled to qualified immunity because they "could not reasonably be expected to anticipate subsequent legal developments, nor could [they] fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818.

Nor may a court in this situation saddle public officials with personal liability merely because it may be adamantly persuaded that its own legal judgments should have been obvious on their face to everyone at all times. Government officials lose the shield of qualified immunity only when the unconstitutionality of their conduct would have been apparent "in the light of pre-existing law." *Anderson*, 483 U.S. at 640; *Harlow*, 457 U.S. at 818; *Malley*, 475 U.S. at 341. Only in the most egregious circumstances would it be appropriate to apply a kind of "Nuremberg" reasoning to expose public officials to the prospect of paying money damages out of their own pockets for violations that courts discover in hindsight but that were not clearly addressed or foreclosed by prior precedents. As the discussion in Parts I and II, *supra*, makes clear, however, this is not such a case.

B. At the Time Respondents Acted, the Courts Had Uniformly Approved Their Conduct, Which Was Common Practice and in Accord with the Marshals Service Policy.

At the time respondents executed the warrant in this case — April 16, 1992 — the scanty case law uniformly held that allowing members of the news media to accompany officers in order to observe and record the execution of a warrant did not violate anyone's constitutional rights. *See Moncrief v. Hanton*, 10 Med. L. Rptr. 1620 (N.D. Ohio 1984); *Higbee v. Times-Advocate, Inc.*, 5 Med. L. Rptr. 2372 (S.D. Cal. 1980); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980). The court below cited this case law as support for its holding on qualified immunity. Pet. App. 14a n.10. In addition, the court noted that this practice was endorsed by the media ride-along policy of the Marshals Service, which was in place at the time. *See* Pet. App. 4a n.3, 15a-16a; J.A. 4-14.

Moncrief, for example, is factually quite similar to this case. There, a husband and wife filed suit under 42 U.S.C. § 1983, alleging that the police entered their house improperly to execute a warrant, accompanied by members of the news media. After the officers entered, they handcuffed the husband, and the media was allowed to photograph him in this state, which caused him embarrassment and humiliation. 10 Med. L. Rptr. at 1620-21. After rejecting the claim that the warrant was invalid, the District Court addressed the plaintiffs' claim that the officers had violated their "right to privacy under the Fourth Amendment by allowing the media to enter their premises along with the police officers and take photographs." *Id.* at 1621. The court found that these allegations did not state a proper claim for the deprivation of any constitutional right, for "the right to be free from unwanted publicity about one's affairs" is protected by the common law, not by the Fourth Amendment, and therefore such conduct does not fall within the "zone of privacy set out in the Constitution as being federally protected." *Id.* at 1622.

Similarly, in *Higbee*, the plaintiffs claimed that their

constitutional rights were violated when law enforcement officials invited the press to be present and to take photographs during the execution of a warrant at plaintiffs' residence. A photograph of the inside of the residence was later published in the newspaper. 5 Med. L. Rptr. at 2372. Rejecting plaintiffs' claim, the District Court held that the constitutional "right to privacy" was not infringed except in cases "involving gross abuses." No such "gross abuse" or independent violation of the protected zone of privacy occurred, however, where police merely allowed members of the news media to observe and record the proper execution of a valid warrant. *Id.* The court dismissed the action, noting that plaintiffs' pendent claim for invasion of privacy under California tort law should be allowed to proceed in the state courts. *Id.* at 2373.

Prahl is also very similar to this case. There, a television newscaster heard reports that a SWAT team was called to a residence where shots had been fired. He was allowed to join the officers and to observe and film their actions in entering the residence, confiscating the guns, and interviewing the suspect. A story on the incident ran on the local television news later that day. The suspect, who was never charged, sued the officers and the newscaster under section 1983, alleging that his constitutional rights were violated "by an unreasonable search and seizure" and by "the filming and broadcasting of that search and seizure without his consent." 295 N.W.2d at 773-74. The trial court dismissed this claim, and the court of appeals affirmed, stating that it was "unwilling to accept the proposition that the filming and television broadcast of a reasonable search and seizure, without more, result in unreasonableness." *Id.* at 774. The court ruled, however, that plaintiff's claim for trespass against the officers and the newscaster would be permitted to proceed on remand to the trial court. *Id.* at 778-82.

These decisions establish that at the time respondents acted, the courts had uniformly rejected claims that their actions violated the Fourth Amendment or any other provision of the Constitution. *See also Scott v. State*, 559 So. 2d 269, 272 (Fla. App. 1990) (rejecting motion to suppress evidence where sheriff's deputies "permitted a television crew to enter the home

during the execution of the warrant," finding no violation of the Fourth Amendment). Instead, allegations of injury to reputation or privacy interests stemming from such conduct were understood to be appropriately addressed under the common law in the state courts. *Cf. Paul v. Davis*, 424 U.S. 693, 699-712 (1976) (such matters are actionable under state tort law, not the United States Constitution).

In addition, at the time the Marshals Service had adopted a "media ride-along" policy that endorsed the practice of having officers allow "reporters and camera crews to go along with Deputies on operational missions so they can see, and record, what actually happens," so that "the media receive an accurate picture of how the Marshals Service operates." J.A. 4. In this case, a reporter and photographer from the Washington *Post* were permitted to ride along with Operation Gunsmoke personnel for about two weeks, in order to observe and report on the nationwide fugitive apprehension program. Pet. App. 4a. It was recognized, consistent with the contents of the policy, that they would observe actual fugitive apprehensions, including the possibility of arrests "planned to take place inside a house or building." J.A. 7; *see id.* at 4. The policy, which presented the formal position of the Marshals Service with respect to such activities, was facially valid and had never been challenged or criticized by any court. Its existence thus reinforces the fact that the law at the time was not understood to establish, let alone "clearly establish," that respondents' conduct in this case violated the Fourth Amendment.

On the contrary, the existence of the Marshals Service policy itself provides strong support for respondents' claim that they are entitled to qualified immunity in this case. *See, e.g., Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994) (officers were entitled to qualified immunity for implementing established policy upheld in one previous case and never before held unconstitutional), *cert. denied*, 115 S. Ct. 1097 (1995); *Sullivan v. Town of Salem*, 805 F.2d 81, 87 (2d Cir. 1986) (if officers "were simply implementing an established policy of the town, then they would have available to them a defense of qualified immunity from personal liability"); *Wallace v. King*, 626 F.2d

1157, 1161 (4th Cir. 1980) (qualified immunity is proper where officers followed longstanding, though unwritten, policy laid down by superiors and not found improper by any court), *cert. denied*, 451 U.S. 969 (1981).

C. At the Time Respondents Acted, No Court Had Ever Held or Indicated that Their Conduct Violated the Fourth Amendment.

At the time respondents acted, no controlling decision and indeed no decision by *any* court *anywhere* in the country had ruled that their actions were unlawful. All of the cases that have reached such a result *postdated* their conduct. In this posture, the court below correctly upheld their defense of qualified immunity. *See* Pet. App. 13a ("Reliance on decisions issued after the events underlying this litigation . . . is inappropriate.").

In particular, the dissent below relied on *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995). Pet. App. 43a-44a. This reliance is improper. *See, e.g., Parker v. Boyer*, 93 F.3d 445, 447 (8th Cir. 1996) (pointing out that because the *Ayeni* decision was not rendered until "after the police in this case executed their search, [it] cannot weigh in the balance against a finding of qualified immunity"), *cert. denied*, 117 S. Ct. 1081 (1997). Even the District Court's ruling in *Ayeni* postdated the actions at issue here. *See Ayeni v. CBS*, 848 F. Supp. 362 (E.D.N.Y. 1994).

On the basis of the Court's square holding in *Mitchell v. Forsyth*, 472 U.S. 511, 533 (1985), reliance on subsequent decisions is improper and requires reversal. In that case, as here, the plaintiff alleged a violation of his constitutional rights based on the Fourth Amendment. The specific complaint in *Mitchell* was that federal officials had wrongfully authorized a wiretap on the plaintiff's telephone. Two years after those actions had taken place, the Supreme Court had ruled that such conduct was unlawful and violated the Fourth Amendment. *See United States v. United States Dist. Ct.*, 407 U.S. 297 (1972). At the time of the acts at issue, however, only two courts had addressed it. Both were federal district courts, and both had upheld the legality of the wiretaps in unpublished opinions. *See*

Mitchell, 472 U.S. at 533 (citing *United States v. Dellinger*, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970), *rev'd*, 472 F.2d 340 (7th Cir. 1972); *United States v. O'Neal*, No. KC-CR-1204 (D. Kan. Sept. 1, 1970), *app. dismissed*, 453 F.2d 344 (10th Cir. 1972)). Within days after the officials authorized the wiretap challenged in *Mitchell*, two other federal courts had held such conduct to be illegal, but those decisions postdated the events in question. *See* 472 U.S. at 533.

Accepting the federal officials' defense of qualified immunity, the Court held that in light of the two unpublished decisions extant at the time, to say that the contrary position "had already been 'clearly established' is to give that phrase a meaning that it cannot easily bear." *Mitchell*, 472 U.S. at 535. Under *Harlow*, "officials performing discretionary functions are not subject to suit when such questions are resolved against them only after they have acted," for this "hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected." *Id.* "The decisive fact is not that Mitchell's position turned out to be incorrect, but that the question was open at the time he acted," as shown by the fact that the Supreme Court itself intervened to decide the issue two years later. *Id.*

The holding in *Mitchell* is decisive in favor of respondents' claim to qualified immunity in this case. *See* Pet. App. 13a ("Reliance on decisions issued after the events underlying this litigation, whether the decisions were decided by this court or others, is inappropriate.") (citing *Mitchell*). Several decisions at the time had rejected claims that such conduct violated federal constitutional rights, and no decision had accepted such a claim. The Court has granted *certiorari* to address the issue for the first time in this case and in *Hanlon v. Berger*, No. 97-1927. And the Court has repeatedly admonished the lower courts that public officials "cannot be expected to predict the future course of constitutional law." *Procunier*, 434 U.S. at 562..S. at 343, 341). In recent years, departures from this admonition have been grounds for summary reversal. *See Hunter v. Bryant*, 502 U.S. 224 (1991) (per curiam). It is equally clear that qualified immunity should be afforded in this case.

D. Relevant Decisions and the Debate Here Show that It Is Not Apparent, Even Now, that Respondents Violated the Fourth Amendment.

It is also pertinent that the proper resolution of the Fourth Amendment issue presented in this case plainly is not obvious, even today, to many of the federal and state judges who have grappled with it. The most direct indication of this uncertainty is the Court's decision to grant *certiorari* and decide the Fourth Amendment issue in this case and in *Hanlon*, which spawned sharply conflicting decisions in the courts below.[14] *See Mitchell*, 472 U.S. at 534 (finding it significant for purposes of qualified immunity that "this Court found the issue sufficiently doubtful to warrant the exercise of its discretionary jurisdiction" to decide it and give it "the definitive answer that it demanded"). And Parts I and II, *supra*, discuss in detail all the reasons why respondents' conduct in this case does not violate the Fourth Amendment at all.

The lower courts are still divided on the underlying constitutional issue, seven years after the events of this case. In *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997), the panel split on the issue. The two Judges Arnold held that it was not "self-evident that the police offend general fourth-amendment principles when they allow members of the news media to enter someone's house during the execution of a search warrant." *Id.* at 448. Judge Rosenbaum, concurring separately, concluded that admitting representatives of the news media into the home without securing the resident's express consent did violate the Fourth Amendment. *Id.* at 448 (Rosenbaum, J., concurring). But all three judges found that the

---

[14] In *Hanlon*, the District Court accepted the officers' defense of qualified immunity, judging that the law was still evolving on the Fourth Amendment issue, but a panel of the Ninth Circuit reversed. *See Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997), *cert. granted*, No. 97-1927. In this case, the District Court found that the officers had violated the Fourth Amendment and rejected their defense of qualified immunity, but a panel of the Fourth Circuit reversed, and the full court sitting *en banc* agreed with the panel. *See* Pet. App. 3a & n.2.

officers were entitled to qualified immunity, since even the most recent decisions "would appear to us to indicate at most only the beginnings of a trend in the law." *Id.* at 447 (majority opinion).

Similarly, in this case the majority of the *en banc* court stated that "reasonable jurists can differ" on the Fourth Amendment issue posed here. Pet. App. 14a. They noted, in particular, that "reasonable officers may have perceived that permitting the reporters to accompany them served a legitimate law enforcement function." *Id.* at 15a. Judge Murnaghan and the other dissenting judges strenuously disagreed, though they acknowledged that the Marshals Service at the time had adopted a "media ride-along policy" to govern situations where members of the news media would accompany officers to observe and report on their actions. *Id.* at 21a (Murnaghan, J., dissenting).

Other courts have now held that law enforcement officers violate the Fourth Amendment when they allow members of the news media to accompany them and to observe and record their execution of a warrant. *See, e.g., Hagler v. Philadelphia Newspapers, Inc.*, 1996 WL 408605, Civ. No. 96-2154 (E.D. Pa. July 12, 1996). These courts agree with the Second Circuit's holding in *Ayeni* that officers violate the Fourth Amendment when they bring into the home third parties who are "neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there," in order "to magnify needlessly the impairment of their right of privacy." 35 F.3d at 686. As discussed in Part ID, *supra*, however, it is far from clear that the presence of news media cannot reasonably be judged to serve a "legitimate law enforcement purpose." Indeed, the court below was emphatic on this point, stressing the importance of understanding "the distinction between an intent that the reporters assist in the actual execution of the warrant and a reasonable belief that permitting the reporters to accompany the officers served a legitimate law enforcement purpose." Pet. App. 16a. Moreover, the court's conclusion in *Ayeni* that photographing or videotaping events which are in the officers' plain view amounts to a seizure under the Fourth Amendment, *see* 35 F.3d at 688, is almost certainly incorrect, as explained more fully in Part IB, *supra*.

In addition, the *Ayeni* holding has been roundly criticized for having departed from this Court's treatment of qualified immunity claims by failing "to define narrowly the right allegedly violated, instead describing the violation in abstract and general terms." *Bills*, 52 F.3d at 602. The *Ayeni* court had found that the law was "clearly established" because it has "long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties." 35 F.3d at 686. The *Bills* court cogently commented that it is "hard to imagine any contested search that could not be portrayed as an invasion of privacy, and even more difficult to see how a police officer could tailor his conduct under such a vague standard." 52 F.3d at 602. As with petitioners' rather abstract discussion of colonial common-law cases, such generalization of the Fourth Amendment would reduce the doctrine of qualified immunity to "a mere rule of pleading." *Id.*; *see also Anderson*, 483 U.S. at 639 (same).

This criticism is consistent with the Court's precedents governing the application of qualified immunity. In *Anderson*, the Court noted that operation of the qualified immunity standard greatly depends upon the level of generality at which the relevant "legal rule" is identified. 483 U.S. at 639. The Court cautioned that a plaintiff who alleges a constitutional tort cannot circumvent the plainly established rule of qualified immunity simply by alleging violations of extremely abstract rights. For example, "the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates the Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right." *Id.* To define the contested rights at an abstract level of generality would thus eviscerate the important protections that the Court affords through the doctrine of qualified immunity. *Id.*

In this situation, the doctrine of qualified immunity is designed to allow public officials to carry out their duties with "the decisiveness and the judgment required by the public good." *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). Only by

faithful application of these settled principles can law enforcement officers "reasonably anticipate when their conduct may give rise to liability for damages" and tailor their behavior accordingly. *Scherer*, 468 U.S. at 195. Once again, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. In the circumstances at issue here, respondents cannot plausibly be placed in either category.[15]

Only by upholding qualified immunity in this case would the Court remain faithful to its consistent warning that public officials are not required and "cannot be expected to predict the future course of constitutional law." *Procunier*, 434 U.S. at 562. That would be precisely the effect if the Court were to reject respondents' qualified immunity defense here. Particularly where — as here and as in *Mitchell* — there is no preexisting authority that clearly establishes the law one way or the other, and other lower court decisions had uniformly held that such conduct was lawful, this landscape should be the decisive factor which requires the defense of qualified immunity to be upheld.

E. Petitioners Offer No "Clearly Established" Law Existing at the Time to Defeat the Defense of Qualified Immunity Here.

Petitioners recognize that the case law extant at the time had uniformly upheld the legality of respondents' conduct, though they disparage these precedents on grounds that they are mostly unpublished and were issued from "remote" jurisdictions. Pet. Br. 42-44. And they tacitly concede that the Court has never addressed even the general issue of when third parties may accompany officers who are executing a warrant, let alone the more specific issues presented when the accompaniment is by members of the news media. Indeed, petitioners acknowledge

---

[15] As the Court has said about the "fair notice" requirement in the criminal law, the situation here is one where "disparate decisions in various Circuits might leave the law insufficiently certain" to be "clearly established." *United States v. Lanier*, 117 S. Ct. 1219, 1226-27 (1997).

that only one federal appellate decision had addressed even the general issue prior to April of 1992 — the Sixth Circuit's first interlocutory ruling in *Bills*, which was issued about a month before the events occurred in this case. *See* Pet. Br. 39-40 (discussing *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992)). That decision, however, was readily distinguished by the court below on the same grounds as the *Buonocore* case, because the officers in *Bills* had permitted the third parties to undertake "an independent search for items not described in the warrant," which did not occur here. *See* Pet. App. 11a n.6 & 12a n.9 (discussing and distinguishing *Buonocore* and *Bills*).

Petitioners are thus left only with subsequent decisions, which cannot be relied on as supporting authority, *see Mitchell*, 472 U.S. at 535; *Harlow*, 457 U.S. at 818, and their handful of colonial common-law cases which, as discussed previously, are inapposite and also are made to operate on too general a level to control the issues presented in this case, *see supra* Section IIA. In fact, there was no law whatsoever, and certainly no "clearly established" law, existing at the time respondents acted that had disapproved of such conduct or otherwise made its unlawfulness "apparent" to a reasonable officer. *Anderson*, 483 U.S. at 640.

Petitioners fault the court below for supposedly misapplying *Anderson*. Pet. Br. 34-36. According to petitioners, the court below incorrectly held that it must accept a defense of qualified immunity unless the Supreme Court or the Court of Appeals has previously issued "a decision establishing unconstitutionality in a factually indistinguishable case." *Id.* at 34. This is, to be sure, a legal standard that *Anderson* rejected, but it is not the legal standard that the court below applied in this case.

In *Anderson*, the Court explained that the application of qualified immunity to various situations, such as the kinds of fact-specific situations that arise under the Fourth Amendment, may raise first a legal question about *law*, and second a legal question about *facts*. With respect to the first issue, the Court emphasized that the inquiry into whether the law is "clearly established" must not occur at too great a "level of generality,"

for to hold that any action that violates a constitutional right *ipso facto* violates a right that is clearly established by the Constitution would reduce the qualified immunity doctrine to "a rule of pleading." 483 U.S. at 639-40. *See also supra* Section IIID (discussing media accompaniment cases in terms of this prong of *Anderson*). But the Court went on to point out that even where a general legal rule is identified, and is determined to be "clearly established," there is still a separate issue about whether it was clearly established that the circumstances confronted in a given case fall within the ambit of that general rule. *Id.* at 640-41. The Court's discussion of this secondary but nonetheless important issue merits quotation at length:

> Anderson contends that the Court of Appeals misapplied these principles. We agree. The Court of Appeals' brief discussion of qualified immunity consisted of little more than an assertion that the general right Anderson was alleged to have violated — the right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances — was clearly established. The Court of Appeals specifically refused to consider the argument that it was *not* clearly established that the circumstances with which Anderson was confronted did not constitute probable cause and exigent circumstances. The previous discussion should make clear that this refusal was erroneous. It simply does not follow immediately from the conclusion that it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment that Anderson's search was objectively legally unreasonable.

Id. (emphasis in original).

This two-part inquiry is reflected precisely in the Court of Appeals' opinion in this case. First, the court below determined that there was "no clearly established law" indicating that respondents had "exceeded the scope of an arrest warrant by

permitting reporters to engage in activities in which they themselves could have engaged consistent with the warrant." Pet. App. 9a-10a. As we have seen, this determination is correct and, standing alone, is dispositive of the qualified immunity issue. Second, the court below determined that, in any event, it was not clearly established that the circumstances confronted by respondents even were encompassed by the rule postulated by petitioners:

> Furthermore, even if we were to agree with the Wilsons that in 1992 it was clearly established that the Fourth Amendment was violated if officers permitted third parties who were not expressly authorized by the warrant and who were not assisting reasonable law enforcement efforts related to the execution of the warrant to accompany them into a residence, we could not conclude that it was clearly established that the conduct in which these officers engaged manifestly fell within the ambit of that rule.

Id. at 10a. The court went on to present several reasons why reasonable law enforcement officers "could have believed that permitting the reporters to observe and photograph the execution of the arrest warrant advanced a legitimate law enforcement purpose related to the execution of the warrant." *Id.*

This approach is fully in accord with *Anderson*. Even if the existing case law had clearly established the constitutional rule sought by petitioners in this case — which it did not — the court must still determine "whether a reasonable officer could have believed" that the media could properly accompany him into the home in light of "the information the searching officers possessed." *Anderson*, 483 U.S. at 641. In this case, that secondary inquiry translated into the question of whether respondents could reasonably have believed that the media's presence "served a legitimate law enforcement purpose" in this and similar instances. Pet. App. 16a. The court below found that law enforcement officers acting in good faith "reasonably could have concluded that permitting the reporters to

accompany them while executing the warrant served a legitimate law enforcement purpose." *Id.* at 16a-17a. As discussed earlier, that conclusion is amply justified. *See supra* Section ID. It is, moreover, an accurate application of the Court's precedents on qualified immunity, and one that deserves to be upheld in this case. On each of the separate prongs of the qualified immunity doctrine as the Court articulated them in *Anderson*, respondents are entitled to prevail here.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

RICHARD A. CORDRAY
Counsel of Record
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Counsel for Federal Respondents Harry Layne, James A. Olivo, and Joseph L. Perkins

January 1999

APPENDIX

A1

The Washington Post
Friday, May 1, 1992
Metro, Page D1

For Fugitives, End of Freedom Dawns Suddenly; Early Morning Raids by Marshals Exploit the Element of Surprise

by Paul W. Valentine
Washington Post Staff Writer

"Police! Open the door! It's coming down!"

Kicked hard, twice, the wooden door shattered at the lock. Deputy U.S. Marshal Tony Oliva and Montgomery County Deputy Sheriff Mark Collins lunged, guns drawn, into the bedroom.

A man, naked except for a sheet across his midriff, blinked in apparent confusion from the bed in the dawn light.

"Put your hands where I can see them," barked Collins. ". . . Turn over, face down. FACE DOWN, mister!" Three officers swarmed over the man, cuffing his hands behind his back.

In seconds, it was over. The man, with a record of three convictions and 23 arrests on charges from drug possession to assault, was in custody for alleged violation of probation.

The lightning daybreak raid in Montgomery County was one of thousands nationwide in a special 10-week project just concluded by the U.S. Marshals Service and local police agencies to round up what they call "hardcore fugitives" — prison escapees, bail jumpers and parole and probation violators with records of violence, firearms offenses or drug charges. The "caution code" on their computerized criminal records often read "Armed."

The national dragnet, called Operation Gunsmoke, resulted in 3,313 arrests in 40 metropolitan areas and the seizure of $6.1 million in cash and property, including contraband such as guns and drugs, according to figures released by the U.S. Marshals

Service yesterday. Locally, officers arrested 350 fugitives and seized $37,169 in guns, drugs, and other property.

U.S. marshals are deputized to enforce state warrants as well as federal ones.

Fugitive arrests are a tense, adrenaline-pumping cat-and-mouse game with flak-jacketed officers facing unknown risks as they approach each door — or "fatal funnel" — behind which a fugitive is thought to be lurking.

Is the fugitive armed? Is anyone else there? A child? A dog? Perhaps nothing?

"You never know what's going to happen," said Collins, 28, who along with a fellow deputy sheriff, Eric Runion, was designated as a special deputy U.S. marshal for Operation Gunsmoke, with authority to cross state lines to make arrests. "Each day is different. Each warrant is different," Collins said.

To minimize the potential for violence, officers say they prefer to arrive at dawn. That's when they think fugitives least expect them. Officers burst into a room, three or four strong, guns drawn, shouting orders. The suspect usually acts disoriented, unable to escape or reach for a weapon.

"We like to get them in bed," said Collins. Or, as Oliva, 30, put it, "when they're most vulnerable."

At dawn, "I'm fresh and alert, and they're the least alert," said Joe Perkins, 30, another deputy marshal. Like Oliva, Perkins is a member of the marshals' Special Operations Group, trained in capturing fugitives. Perkins was flown in from Norfolk for Operation Gunsmoke, Oliva from Cleveland.

The officers wear rough clothes and running shoes for the occasional foot chase.

A quick show of force and a stern, no-nonsense manner show that "we're in charge and this is a one-way relationship," Perkins said. "It's got to be that way or someone will get hurt."

Before approaching a house or apartment, the marshals do their homework, checking computerized information for the

fugitive's most recent addresses, criminal history, drug addictions, scars, tattoos, weapons, relatives, intimates, telephone numbers.

The additional information is essential, said Deputy U.S. Marshal Harry Layne, supervisor for the Washington area Operation Gunsmoke, because with criminals "there are two rules: You carry no ID. And if you do, it's false ID."

Most important, several officers said, is making sure the fugitive is home when they arrive. Most criminals are habitual "floaters," who keep moving, Perkins said. The law requires that officers announce their presence and be virtually certain their quarry is inside before breaking down a door.

Getting the right address can be tricky. In addition to computer information, officers rely on relatives, informers and bail bond writers. "If we have a telephone number, sometimes we call a suspect and scam him" with a phony conversation to confirm his presence at an address, Oliva said.

With warrants and mug shots in hand, Oliva and Perkins fanned out into the District and Montgomery and Prince George's counties, along with other teams of marshals and local officers, nabbing suspects in their beds or at work sites or on the street.

The tools of their work included a sledgehammer, affectionately called the "master key," for knocking down fortified doors, as well as shotguns, tear gas and dogs.

Usually these were not needed, according to the marshals. Most suspects surrendered quietly.

At an apartment in the 19600 block of Crystal Rock Drive in Germantown last month, officers arrested Alvin Thomas, 34, wanted on two new drug charges in alleged violation of his probation for a 1987 drug conviction in Frederick County.

His record also showed a 1983 arrest on a charge of assault with intent to murder — a red flag to officers, although there was no record to indicate that he was convicted of the charge.

Thomas surrendered without incident.

With guns reholstered, the officers led him handcuffed to a waiting car. The tension subsided. Collins lit a cigarette for Thomas. The two chatted easily.

Oliva sniffed the early-morning breeze. "Spring's in the air," he said. "Crooks going to jail. You got to love this country."

PHOTOS by Margaret Thomas

Photo Caption: Deputy Marshal Tony Oliva gives Eric Runion a boost at a Gaithersburg house.

Photo Caption: At left, Deputy Sheriff Eric Runion guards Frederick McCann, who was apprehended in Silver Spring. At top, above, Deputy Marshal Tony Oliva, crouching, and Deputy Sheriff Mark Collins prepare to go through a door, while below, Oliva talks with Charles Bailey, arrested in Kensington, in a police car.